



# IS THIS WHAT THE TEN

## BUSINESS LICENSE REVOCATION

**Rather than attempting to frustrate local businesses, state legislators should welcome the influx of foreign workers who contribute to our rich culture.**

**by Linda Rose and Rose Paxtor**

*"A person shall not knowingly employ, recruit, or refer for a fee for employment, an illegal alien."<sup>1</sup>*

**W**ith more than an estimated 100,000 undocumented workers supporting the Tennessee workforce, one wonders precisely what the Tennessee General Assembly intended when it enacted a law incorporating the above language. The law, which we refer to as the "business license revocation law," took effect January 1, 2008, and threatens to snatch the licenses of Tennessee businesses that employ undocumented workers.

There is no doubt the face of the Tennessee workforce is changing as more foreign workers<sup>2</sup> make their way to our state. A 2003 study using U.S. Census figures estimated the number of undocumented workers supporting the Tennessee economy grew from 9,000 in 1990 to 46,000 in 2000.<sup>3</sup> On one hand, anti-immigrant voices have grown correspondingly louder and demand harsher penalties in response to the increased foreign presence. But on the other hand, a recent MTSU study reveals the majority of Tennesseans have grown more lenient about, sympathetic toward, and accustomed to the influx of our foreign workforce, favoring a path to citizenship.<sup>4</sup> No doubt some of those polled must have been business owners with trusted and valued foreign employees.

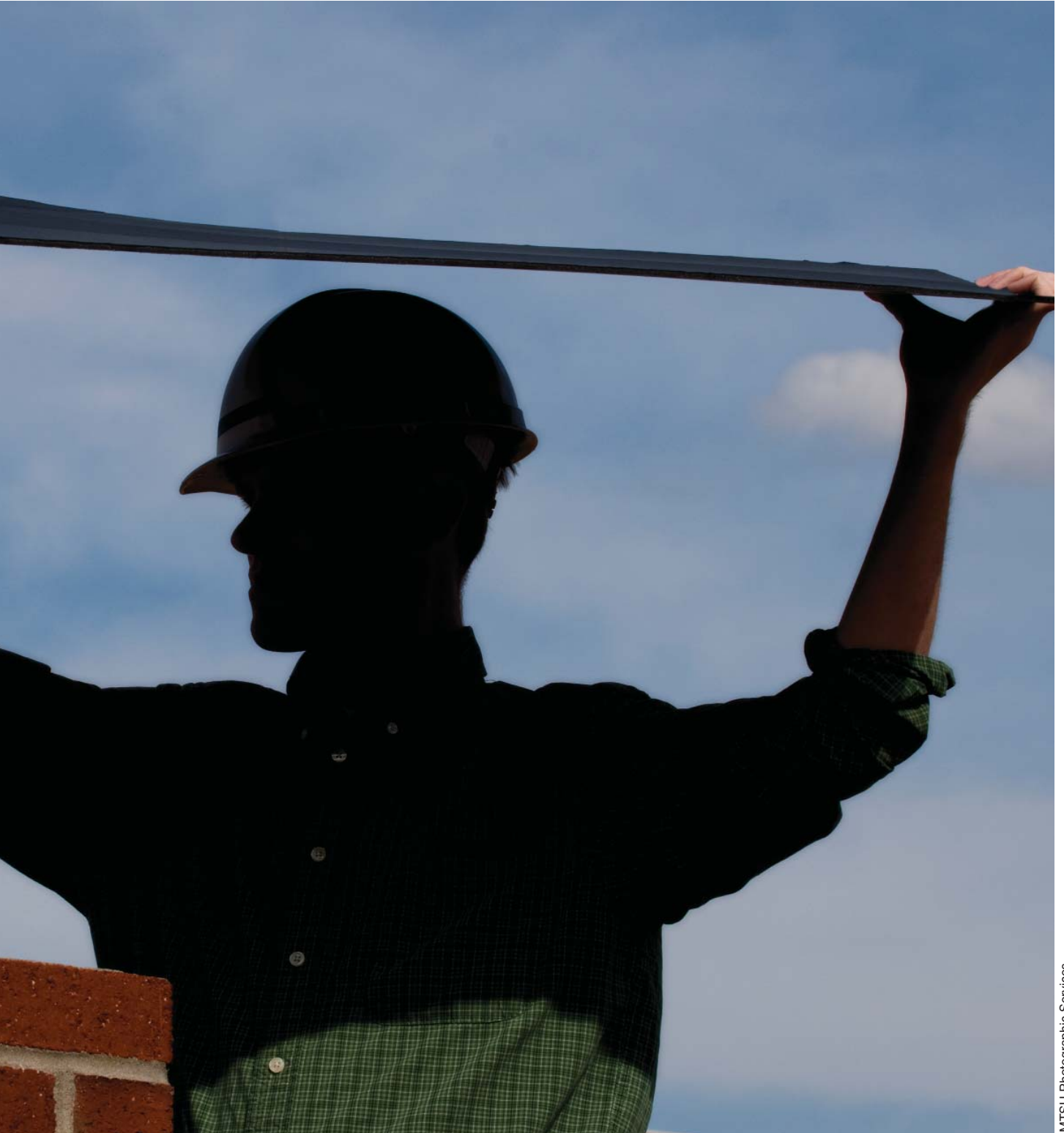
Is business license revocation an appropriate response to the undocumented workforce? And is this what the Tennessee economy needs? Let's start by taking a close look at the law itself.

The basic command of the law is that employers knowingly using undocumented



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# TENNESSEE ECONOMY NEEDS?



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workers shall be, on the first offense, issued a warning; on the second offense, subjected to a hearing; and if found in violation, penalized with business license revocation for up to one year. This law expands greatly on the federal law on hiring practices, which has been in place since 1986 and imposes civil fines and criminal penalties for knowingly hiring undocumented workers.<sup>5</sup> The Tennessee legislature takes the punishment of employers further, however, by threatening their very ability to exist.

The Tennessee license revocation law does require state and local government agencies to report hiring violations. Reports of violations set in motion a hearing process with the workforce agency of the state Department of Labor that can result in the revocation of the state business license.<sup>6</sup> The provisions of the law are summarized below. We include some policy comments to aid employers in determining how to manage their business affairs in the face of this law.

***Employment of “illegal aliens” forbidden.***

Employers are forbidden from employing illegal aliens. The Tennessee legislature defines the term “illegal alien” as including anyone who is not a Lawful Permanent Resident or otherwise authorized to work.<sup>7</sup> Among those labeled illegal are spouses of professional workers residing lawfully in the United States but not authorized to work. It would also include someone who is completely legal in the United States but awaiting official work authorization. The reality, however, is that undocumented workers (also known as illegal aliens) make up a significant part of the Tennessee workforce. And in the face of labor shortages and uncompromising immigration laws, employers are left with no option other than to draw from the undocumented workforce. What the Tennessee legislators could do is work with federal legislators to promote laws that will allow employers to legalize their workers rather than punish employers for their efforts to survive and sustain their businesses.

**“Knowingly.”** Violations of the law hinge on whether an employer knows the worker is undocumented. “Knowingly” is defined as having “actual knowledge” and failing to determine an employee’s immigration status.<sup>8</sup> The onus of having to determine an employee’s immigration status is great, to say the least. Local employers indeed are not immigration specialists and cannot and should not be vested with the responsibility to determine immigration status.

**Safe hiring practices.** Employers are required, as under existing federal law, to verify the

employment authorization of all new hires using the document lists found on immigration form I-9. The verification requirement is met even if documents presented to satisfy the I-9 are later found to be fraudulent,<sup>9</sup> as long as the employer has acted in good faith. But the federal government already has put this system in place with enforcement efforts widespread across the country. It seems redundant, and overly burdensome to employers, for the Tennessee legislature to create yet another layer that hinders employers from operating their businesses.

The Tennessee law rewards employers that act fast. Employers who check work authorization documents as required, within 14 days of hire, are not in violation.<sup>10</sup> Again, however, this simply repeats a system the federal government has already put in place.

An employer can avoid an allegation of violating the law by using the federal database known as E-Verify. This system allows employers to check the immigration status of a prospective worker, and if the system confirms a name and Social Security number, the employer can hire the prospective worker without fear of penalty. The database is fraught with error, however, and could potentially prevent an employer from hiring a U.S. citizen. Only two states in the nation require employers to use E-Verify: Arizona and Mississippi.<sup>11</sup> At least one state actually prohibits it: Illinois.<sup>12</sup> All other states, including Tennessee, are neutral or silent on the use of E-Verify for most employers. Given the great potential for error in hiring, neutrality is probably the safest and best approach. The State of Tennessee should not endorse or require an employment verification system that is not 100 percent accurate. Otherwise, innocent parties—employers and employees alike—will be injured. But under the Tennessee business license revocation law, employers using E-Verify to determine work authorization of new hires will not be found to have hired in violation of the law.<sup>13</sup> This position implicitly endorses a system that is far from perfect.

**Reports of violations.** The investigation of a violation originates with the employee of any state or local government agency. If an employee of one of those agencies has any reason to believe an employer is employing “illegal aliens,” the agency employee is required to file a complaint with the state workforce agency.<sup>14</sup> This vests the government employee with an unwieldy scope of discretion. And those with anti-immigration sentiments could take this grant of authority beyond what is reasonable. The law should impose a reasonableness standard and not grant untrained, uninitiated government workers such wide latitude of

power. Once the workforce agency receives a report, it is required to investigate.

**Right to a hearing before a business license can be revoked.** If the workforce agency investigation yields substantial evidence of a hiring violation, the employer is scheduled for a contested case hearing.<sup>15</sup>

The employer must be mailed a notice of the hearing providing the reasons for the hearing. The employer has the right to present evidence of good faith compliance with the law by having checked authorization documents.<sup>16</sup> At this point the employer should seriously consider retaining immigration or employment law counsel. There may be viable defenses or explanations for the hiring that only a lawyer skilled in these matters can unravel in a contested hearing.

This type of hearing can be held only if the business has some license issued by the state and a violation is established by clear and convincing evidence. Again, “clear and convincing evidence” is a legal term the employer might want to turn over to the lawyer to dispute with the hearing board. If the board determines a knowing violation has occurred, the workforce agency must order the relevant government agency to suspend the employer’s license to do business.

*Violation #1.* The first time an employer is found in violation of the state law, that license will be revoked until the employer shows the violation has been corrected. Here, the employer needs to take some action. The employer must either require the employee to correct the discrepancy or take the drastic step of terminating employment. Either way, the license can be reinstated if the employer submits a sworn statement attesting it is no longer employing an “illegal alien.”<sup>17</sup> If the employer opts not to take any action, a finding of a second violation, with a more drastic result, will likely take place.

*Violation #2 and beyond.* A finding of any subsequent violations by an employer will result in a much more serious penalty. The business license of an employer whose license was suspended for hiring undocumented workers within the past three years must be revoked for one year.<sup>18</sup> Ouch!

Despite the fact that the undocumented workforce is undeniably entrenched in the American way of life (and Tennessee economy), Congress has failed to provide a remedy for this unfortunate circumstance. With a worker shortage, there are virtually no laws that allow employers to legally hire essential skills employees, such as service industry workers, construction workers, and the like. The federal government, constitutionally vested with the authority to control and govern immigration, is struggling to put the proper system in place.

States that meddle in the immigration debate only add to the fervor.

Rather than attempting to frustrate local businesses, Tennessee state legislators should look to laws that will help alleviate the worker shortage problem, create systems so that the workers can contribute to the economy and pay taxes as needed,<sup>19</sup> and welcome the influx of foreign workers who contribute to our rich culture. We are, after all, a nation born of immigrants. ■

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## Notes

1. Tennessee Code Annotated (T.C.A.) § 50-1-103(b) (2007).

2. Legally, the term “immigrant” indicates that an individual is legally residing in the U.S. as a Lawful Permanent Resident, known as a “green card” holder. The media, however, has misused the term immigrant to such an extent that it now popularly refers to any foreigner. For the sake of correctness, we shall use the term “foreign worker” or “foreigner” throughout this article and refer to “immigrant” only when we mean a Lawful Permanent Resident.

3. A Profile of the Foreign-born in the Nashville Economic Market, published in October 2003 by the Urban Institute for the Nashville New American Coalition.

4. Janell Ross, “Tennesseans Get Softer on Illegal Immigration, MTSU Poll Finds,” *The Tennessean*, March 14, 2008, A1.

5. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat 3359. Federal law on employing undocumented workers is codified at 8 U.S.C. § 1324a.

6. T.C.A. § 50-1-103(e).

7. T.C.A. § 50-1-103(a)(4).

8. T.C.A. § 50-1-103(a)(5).

9. T.C.A. § 50-1-103(a)(7).

10. Legal Ariz. Workers Act, H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (effective January 1, 2008); Miss. Employment Prot. Act, S.B. 2988, 2008 Reg. Sess. (Miss. 2008) (effective July 1, 2008).

11. Ill. Right to Privacy in the Workplace Act § 12(a), Pub. Act 95-0138, H.B. 1744, 95th Gen. Assem. (Ill. 2007). Litigation has delayed enforcement. See Press Release, Dept. of Homeland Security, Notice for Illinois Employers about E-Verify (December 31, 2007) ([www.uscis.gov/files/pressrelease/Illinois\\_EVerify\\_31dec07.pdf](http://www.uscis.gov/files/pressrelease/Illinois_EVerify_31dec07.pdf)).

12. T.C.A. § 50-1-103(c).

13. T.C.A. § 50-1-103(e).

14. *Id.*

15. *Id.*

16. T.C.A. § 4-5-320 (2005).

17. T.C.A. § 50-1-103(e)(1).

18. T.C.A. § 50-1-103(e)(2).

19. Even undocumented workers pay taxes simply by way of living in the U.S.: purchasing goods and using services. Many wish to pay their proper income taxes as well but are prevented from doing so because the Social Security Administration will not issue them a number to pay taxes.

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